

**STATE OF TENNESSEE
DEPARTMENT OF ENVIRONMENT AND CONSERVATION**

IN THE MATTER OF:)	DIVISION OF WATER
)	POLLUTION CONTROL
JIMMY TOSH d/b/a TOSH FARMS)	
)	CASE NO. 07-0281
RESPONDENT.)	

**PETITION FOR APPEAL OF COMMISSIONER'S ORDER AND
ASSESSMENT AND REQUEST FOR HEARING
BEFORE THE TENNESSEE WATER QUALITY CONTROL BOARD**

Jimmy Tosh, doing business as Tosh Farms (hereinafter "Respondent"), hereby files this Petition for Appeal of the Order and Assessment dated June 18, 2007, and requests a hearing before the Tennessee Water Quality Control Board pursuant to Tenn. Code Ann. §§ 69-3-101 *et seq.*, Tenn. Code Ann. § 69-3-109(3), Tenn. Code Ann. § 69-3-110, Tenn. Code Ann. § 4-5-301 *et seq.* (the Uniform Administrative Procedures Act or "UAPA"), and Rule 1200-4-1-.02. By this Petition and Request for Hearing, Respondents appeal the "Commissioner's Order and Assessment," dated June 18, 2007 ("Order") and request that the Water Quality Control Board ("Board") conduct a hearing on this Petition.

BACKGROUND

1. The Commissioner of the Tennessee Department of Environment & Conservation ("TDEC") issued an Order and Assessment against Respondent dated June 18, 2007.
2. Respondent received the Order and Assessment on June 22, 2007.

3. Pursuant to Tenn. Code Ann. § 69-3-110(a)(3) and TDEC Rule 1200-4-1-.02(3) this Petition has been timely filed.
4. Respondent Jimmy Tosh, dba Tosh Farms, is a Tennessee resident doing business in Henry, Tennessee, among other places.

PETITIONER'S GROUNDS FOR APPEAL

I. PETITIONER COMPLIED WITH THE REQUIREMENTS IN PARAGRAPH 1 OF SECTION XXII OF THE ORDER AND ASSESSMENT BEFORE ISSUANCE OF THE ORDER AND ASSESSMENT.

5. Prior to receiving the Commissioner's Order and Assessment, Petitioner had performed the actions required in Paragraph 1 of Section XXII. The items required by this paragraph were submitted to TDEC's Jackson Environmental Field Office on May 3, 2007. Copies were provided to Patrick Parker in TDEC's Office of General Counsel on June 29, 2007.

II. PETITIONER HAS COMPLIED WITH THE REQUIREMENTS OF PARAGRAPH 2 OF SECTION XXII OF THE ORDER AND ASSESSMENT.

6. Petitioner's consultant, Validus Services, LLC, on Wednesday, July 18, filed a revised NPDES CAFO Permit application (EPA Forms 1 and 2B) and Comprehensive Nutrient Management Plan (CNMP) with (1) the Tennessee Department of Agriculture, (2) TDEC's Central Office in Nashville, and (3) TDEC's Jackson Environmental Field Office. Petitioner has substantially complied with all of the specific requirements set forth in Paragraph 2 that the Order and Assessment requires to be included in the revised NPDES

application and CNMP, yet Petitioner asserts that some of the specific requirements are either irrelevant, impossible to obtain, or nonexistent.

III. PETITIONER DOES NOT AGREE THAT AN INDIVIDUAL NPDES PERMIT IS REQUIRED FOR THE TRAILER WASH AND ASSOCIATED LAGOON AS REQUIRED IN PARAGRAPH 3 OF SECTION XXII OF THE ORDER AND ASSESSMENT.

7. Petitioner asserts that the trailer wash and associated lagoon are part of the farm operations and may be permitted through the CAFO permit program. This facility is not a truck wash; rather, it is a trailer wash. The facility is not a point source because there is no discharge. The only contaminants that flow into the associated lagoon are pig manure, disinfectant, and associated materials. The chemical analysis of the contents of the associated lagoon look remarkably similar to other lagoons, and the lagoon contents are used for land application. Thus, an individual NPDES permit is not required.

IV. THE COMMISSIONER ABUSED HIS DISCRETION AND ACTED ARBITRARILY AND CAPRICIOUSLY IN ASSESSING A CIVIL PENALTY OF SEVENTY-FIVE THOUSAND DOLLARS (\$75,000.00) FOR THE VIOLATIONS ALLEGED IN THE ORDER AND ASSESSMENT.

8. The civil penalty of seventy-five thousand dollars (\$75,000.00) for the violations alleged is unduly burdensome, arbitrary, capricious, and an abuse of discretion.

V. THE COMMISSIONER ABUSED HIS DISCRETION AND ACTED ARBITRARILY AND CAPRICIOUSLY IN ASSESSING DAMAGES IN THE AMOUNT OF ONE THOUSAND AND THREE HUNDRED FIFTY EIGHT DOLLARS AND FORTY-TWO CENTS (\$1,358.42) FOR THE VIOLATIONS ALLEGED IN THE ORDER AND ASSESSMENT.

9. The damages of one thousand and three hundred fifty-eight dollars and forty-two cents (\$1,358.42) for the violations alleged is unduly burdensome, arbitrary, capricious, and an abuse of discretion.

WHEREFORE, RESPONDENTS HEREBY REQUEST THE FOLLOWING RELIEF:

1. That the Division, Office of General Counsel, and other TDEC personnel meet with respondents and negotiate appropriate civil penalties, damages, and other relief.
2. If the negotiations requested above do not result in a mutually agreeable resolution of this Order and Assessment, that the Board hold a hearing on this appeal.

Respectfully submitted,

WALLER LANSDEN DORTCH & DAVIS, LLP

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*ATTORNEYS FOR JIMMY TOSH dba
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CERTIFICATE OF SERVICE

I hereby certify that I have hand-delivered copies in duplicate of the foregoing Petition for Appeal of Commissioner's Order and Assessment and Request for Hearing Before the Water Quality Control Board to:

The Honorable Jim Fyke, Commissioner
Tennessee Department of Environment & Conservation
L&C Annex, 1st Floor
401 Church Street
Nashville, Tennessee 37243

and that copies of the same were hand-delivered to:

Mr. Paul E. Davis, Director
Division of Water Pollution Control and
Technical Secretary, Tennessee Water Quality Control Board
L&C Annex, 6th Floor
401 Church Street
Nashville, Tennessee 37243

Patrick Parker, Esq.
Office of General Counsel
Tennessee Department of Conservation and Environment
L&C Tower, 20th Floor
Nashville, TN 37243

On this, the 20th day of July, 2007.

Michael K. Stegg